

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 14, 2005

ALBERT BENDER ET AL. v. METROPOLITAN GOVERNMENT ET AL.

Appeal from the Chancery Court for Davidson County
No. 04-624-II Carol McCoy, Chancellor

No. M2004-01875-COA-R3-CV - Filed October 27, 2005

This appeal involves the plaintiffs' efforts to overturn a decision of the Metropolitan Planning Commission. After the plaintiffs' first complaint was dismissed for failure to name the Metropolitan Government of Nashville and Davidson County as a defendant and for improper service of process, the plaintiffs filed a nearly identical complaint naming the Metropolitan Government as a defendant. The trial court dismissed the second suit in part because the claims were barred by the sixty (60) day statute of limitations provided by Tenn. Code Ann. § 27-9-102 (2000). We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., WILLIAM B. CAIN, PATRICIA J. COTTRELL, and FRANK G. CLEMENT, JR., JJ., delivered the opinion of the court.

Albert M. Bender, Antioch, Tennessee, Pro Se.

Karl F. Dean, Director of Law; J. Brooks Fox, and John L. Kennedy, Nashville, Tennessee, for the appellee, Metropolitan Government.

MEMORANDUM OPINION¹

I.

On December 11, 2003, Albert Bender and the Four Corners Neighborhood Association filed a complaint in the Chancery Court for Davidson County against the "Metro Planning Department"

¹Tenn. Ct. App. R. 10 provides:

The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

challenging a November 13, 2003 decision of the Metropolitan Planning Commission. On February 9, 2004, the trial court dismissed the complaint on the grounds that the Metropolitan Planning Department is not an entity capable of being sued and that service of process was not properly perfected in accordance with Tenn. R. Civ. P. 12.02(5).² The trial court specifically found that Mr. Bender was aware that his complaint could have been amended prior to the hearing on the motion to dismiss and that Mr. Bender had ample time to effect service of process. Mr. Bender attempted to appeal this order, but the appeal was dismissed by this court on February 1, 2005, for failure to file a brief.

On February 23, 2004, Mr. Bender and the Four Corners Neighborhood Association filed a complaint nearly identical to the December 11, 2003 complaint except that it named both “The Metropolitan Government” and the “Metro Planning Department” as defendants. The Metropolitan Government of Nashville and Davidson County promptly filed a motion to dismiss asserting that (1) the Metropolitan Planning Department is not an entity capable of being sued; (2) the new complaint was merely an attempt to circumvent Tenn. R. Civ. P. 15 and the prior order of dismissal; and (3) that the new complaint was not filed within sixty (60) days of the Planning Commission’s actions as required by Tenn. Code Ann. § 27-9-102. Mr. Bender filed an untimely response asserting that the sixty day time period had been tolled by the filing of the December 11, 2003 complaint. On April 7, 2004, the trial court granted the Metropolitan Government’s motion and dismissed the case. The Metropolitan Government of Nashville and Davidson County then filed a motion for sanctions pursuant to Tenn. R. Civ. P. 11. On June 29, 2004, the trial court granted the motion for sanctions and directed Mr. Bender to pay the Metropolitan Government of Nashville and Davidson County \$250. Mr. Bender filed a notice of appeal from the June 29, 2004 order on July 28, 2004.

II.

Judicial review of a decision of the Metropolitan Planning Commission must be sought within sixty (60) days of such decision. Tenn. Code Ann. § 27-9-102; *Campbell v. Bedford County Regional Planning Commission*, 2004 WL 626724, No. M2003-00025-COA-R3-CV. (Tenn. Ct. App. Mar. 29, 2004) (No Tenn. R. App. P. 11 application filed). The Planning Commission rendered its decision on November 13, 2003. Mr. Bender did not file the complaint which is the subject of this appeal until February 23, 2004, one hundred and two (102) days later. Moreover, the sixty (60) day time limit was not tolled by the filing of the December 11, 2003 complaint which was dismissed.

Mr. Bender asserts in his one page brief that “the plaintiffs made no statements before the court that the prior complaint could have been amended prior to the court date.” This argument appears to challenge the February 9, 2004 order dismissing the prior complaint. However, the February 9, 2004 judgment has become final and is not subject to review in this appeal. Mr. Bender also asserts that the Metropolitan Government of Nashville and Davidson County can be sued for

²This dismissal is not subject to appellate review at this point, and this court takes no position regarding the correcting of the decision. However, we note this was an action seeking judicial review of a decision of a board or commission.

the actions of the Metropolitan Planning Commission. We agree, but we do not interpret the trial court's order as holding otherwise. Rather, the trial court dismissed the complaint against the Metropolitan Government because it was not timely filed. Mr. Bender's brief does not address the timeliness of his complaint against the Metropolitan Government, and we find no grounds to reverse the trial court's decision dismissing the complaint as untimely. Likewise, Mr. Bender has not raised any issues regarding the trial court's order for sanctions and we find no grounds to reverse that order.

III.

We affirm the trial court's judgment and remand the case to the trial court for such further proceedings as may be necessary. We also tax the costs of the appeal to Albert Bender for which execution, if necessary, may issue.

PER CURIAM